

ARBITRATION DECISION NO.:

376

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Workers' Compensation

DATE OF ARBITRATION:

August 9, 1991

DATE OF DECISION:

September 12, 1991

GRIEVANT:

Linda White

OCB GRIEVANCE NO.:

34-04-(91-03-07)-0045-01-09

ARBITRATOR:

John E. Drotning

FOR THE UNION:

Bob Steele

John Fisher

FOR THE EMPLOYER:

Lou Kitchen

Valerie Butler, Esq.

KEY WORDS:

Removal

Absenteeism

Employee Assistance

Program

ARTICLES:

Article 24 - Discipline

§24.01-Standard

24.02-Progressive

Discipline

§24.06-Prior

Disciplinary Actions

§24.08-Employee

Assistance Program

Article 29 - Sick Leave

FACTS:

The grievant had been employed by the Bureau of Workers Compensation for 13 years. She had prior discipline for absenteeism, including a ten day suspension in March 1990. The grievant had participated in two EAP programs, yet was late on January 8, 1991 which was the third absence related incident in that pay period, and the fifth on her record. The January 8th incident was not an excused absence and the grievant was removed for absenteeism.

EMPLOYER'S POSITION:

There was just cause for the grievant's removal. She had prior discipline for absenteeism, including a ten day suspension served within the past year. She gave multiple excuses for her tardiness on January 8, 1991. The employer's rules call for removal for the fourth offense and this was the grievant's fifth infraction. Additionally, her absences caused her to fall behind in completing assignments. The grievant did not respond to the EAP programs and the employer is not obligated to suspend discipline because of enrollment in an EAP program.

UNION'S POSITION:

There was no just cause for the grievant's removal. The grievant did have prior discipline for absenteeism including a ten day suspension but she had completed an EAP program after that suspension. She was then told that she must bring in doctor's excuses for absences. The grievant had only two unexcused absences in the past year, and her uncompleted work assignments were not due to her absence. The grievant was tardy on January 8, 1991 but she had called in properly and had a valid excuse for the day. Lastly, the employer failed to meet its burden of proof that just cause existed for the grievant's removal.

ARBITRATOR'S OPINION:

The employer did prove that just cause existed for the grievant's removal. She had received discipline on four occasions, including a ten day suspension within the past year. The employer reduced a contemplated removal to a ten day suspension due to the grievant's completion of an EAP program. The employer did not agree to wipe the grievant's slate clean regarding discipline for absenteeism, only to reduce the penalty for the fourth offense. The grievant was warned of possible removal for absenteeism and she continued to come to work on an irregular basis.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO**

AND

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION LOCAL 11, AFSCME**

ARBITRATION AWARD

HEARING DATE:

August 9, 1991

GRIEVANCE:

34-04-910307-0045-01-09

ARBITRATOR:

John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on August 9, 1991 at the OCSEA offices, Watermark Dr., Columbus, Ohio. Appearing for the Union were: Mr. Bob Steele, Mr. John Fisher, Mr. Thomas Brethaver, Mr. Robert Blackwell, and the grievant, Ms. Linda White. Appearing for the Employer were: Mr. Lou Kitchen, Valerie Butler, Esq., Ms. Nancy Seman, and Mr. John Lucid.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on August 9, 1991. The discussion and award are based solely on the record described above.

II. ISSUE

The parties jointly asked:

“Was the Grievant disciplined for just cause? If not, what shall the remedy be?”

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1, #2A-#2C, #3A-#Q, and #4. The parties also stipulated that:

1. The matter is properly before the Arbitrator and there is no procedural errors.
2. The Grievant was hired 04/10/78.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. MANAGEMENT

Mr. John Lucid testified he worked for the Bureau of Worker's Compensation and was in research and reporting and he had been a statistics supervisor for about 13 years. In that capacity, Lucid said he supervised nine statisticians and those statisticians prepare reports on a weekly, monthly, and quarterly basis. Those reports, said Lucid, are for the Legislature and for internal management.

Lucid said Linda White was a key person in the agency and she knew the work load. He also said he assigned experienced analysts to different tasks.

Lucid said he was aware of White's past discipline record and he had counseled her and wrote up her suspensions as well as her termination.

Lucid said that Employer Exhibit #1 stipulated an Employee Assistance Program participation agreement (EAP) and he went on to say that he did not know if she attended in March of 1990. He said he attended a meeting with White on November 20, 1990. Between October 11th and November 20th, he said White was absent on October 15 and then she called for time off. Lucid went on to say that he talked to White on October 15th and she indicated she wanted a day off and noted she had five hours vacation time and wanted three hours of sick leave so as to get a day off, but she did not say why she wanted the time off. He went on to say that he granted five hours of vacation but no sick leave. White, said Lucid, did not say she was sick. Lucid said that White was not, disciplined for the whole day but she did receive three hours of unexcused

absence.

Lucid went on to say there was a meeting on November 20, 1990 and they discussed her unexcused absences and poor attendance. He went on to say that Nancy Seman told him that White could be terminated for absence and attendance. Lucid said he agreed to reduce White's discipline because she had agreed to attend the EAP program in March of 1990.

Lucid said he agreed to no further discipline because she had significant past discipline; namely, a ten day suspension. He went on to say that on 1/8/91, he did not approve her time off and he said he would mark it unexcused. Lucid went on to say that she called in at 8:48 and her start time was 8:30. He said that the agency policy is to allow people to call one-half hour after starting time and White eventually showed up for work at 10:00 A.M. on 1/8/91.

Lucid said he interviewed White on January 11, 1991 about her late reporting on January 8th and he said that White told him that she needed time on 1/8/91 to see her attorney but later she indicated she did not see her attorney but had to use a bus.

Lucid said that White also told him that she was run down so in effect there were three reasons for her not coming to work; namely, she had to see her attorney, she was run down, and her car needed repair. Lucid went on to say that he denied leave on January 8th because she was behind in her work and she had taken off two times in the same pay period and the January 8th date was her third time off.

Lucid said that after the interview on January 11th, he decided to fire her because of her poor attendance and past disciplinary record.

Lucid acknowledged that he had approved absences for the grievant most of the time between 1990 and January of 1991. He went on to say that leave is granted if possible and he hardly ever denies leave requests.

Lucid went on to say that there were three unexcused absences after the signing of the March 16, 1990 EAP agreement.

Lucid also said that as far back as August of 1986, he had granted White leave without pay up to the time of her removal. He said he has denied other employees leave.

Lucid went on to say that the January work load is heavy and it continues right up on through February. He noted that White was always late on reports and that she should have been part of the team and her absence met that reports could not come out on time.

Ms. Nancy Seman testified she had been with the Bureau of Workers' Compensation for thirteen years and was the Labor Relations Manager. She said she knew Linda White and is well aware of White's disciplinary record. Seman testified she was the Management representative at the step 3 meeting.

Seman testified that Joint Exhibit #3Q is a counseling interview; that is, a written document of a verbal reprimand. She said Joint Exhibit #3P is a written reprimand for unexcused absences which indicated that continued attendance problems would lead to stronger discipline. Joint Exhibit #3O indicates that White was suspended for one day without pay for unexcused absence which is the same charge as the one for this hearing and was dated August 19, 1987. Joint Exhibit #3N indicates that White was suspended for three days, June 21, 22, and 23, under work rule #13 and Joint Exhibit #3M indicates a five day suspension of White in February 1989 for neglect of duty, failure to follow policies, and unexcused absences and falsification. Joint Exhibit #3L dated March 16, 1990, said Seman, was White's ten day suspension for unexcused absences. Seman went on to say that the original request was to terminate White, but the parties agreed to the ten day suspension. Seman went on to say that in the pre-disciplinary meeting the parties modified the ten day suspension if the employee participated in the EAP program.

Seman said that the employee has been disciplined for unexcused absences which go back to August of 1986. Seman said that the unexcused absence on January 8, 1991 was the fifth occurrence and prior to that, there had been four disciplines for unexcused absence and the fourth offense is removal, but the January 8th issue was the fifth offense.

On the November 20, 1990 meeting, Seman said that White was told what would occur if she had more unexcused absences as a result of the EAP. Seman said that she told White that further absence would mean termination.

Joint Exhibit #2K was given to White on 11/20/90 and that complied with Article 29 of the Contract,

Seman said. Article 29 requires a physician's report when someone is on sick leave.

Joint Exhibit #3J was not signed by the Employer, said Seman, although Management honored that EAP agreement made because of White's unexcused absences. Joint Exhibit #3I, said Seman, was another Employee Assistance Program and Management had requested White's termination, but altered it to a ten day suspension without pay. White then was fired, said Seman, because of the fifth occurrence and White had been given two EAP programs but she failed to come to work on a sufficient basis.

On redirect, Seman said that the grievant had four plus violations of rule #13.

Management cross examined Union witnesses. Robert Blackwell was not cross examined. Linda White, on cross, testified that she went to Atlantic City and returned on Sunday, October 14, 1990 prior to calling in for release time on October 15th.

White said that her mother did not live with her but she does help her and she had taken care of her mother who had an heart attack in August of 1990.

White said that Management determines when reports are due.

White, on cross, acknowledged that Joint Exhibit #3P is a written reprimand dated October 30, 1986; Joint Exhibit #3O is a one day suspension on August 19, 1989; Joint Exhibit #3N is a three day suspension in 1988 which indicated that she may be terminated; Joint Exhibit #M is a five day suspension in February 1989; and, Joint Exhibit #L is a ten day suspension in March 16, 1990 and that suspension required the EAP program and also indicated that she could be suspended or terminated.

On cross, White said that she was aware that the Employer had told her that continued infractions would lead to discipline and termination.

2. ARGUMENT

The Employer asserts that just cause exists for Linda White's termination. On 1/8/91, Grievant White feigned illness but she never claimed that there was an emergency with regard to her leave request. Moreover, the Employer points out that the Grievant was surely aware of the procedure to utilize personal leave.

Management goes on to say that it can deny personal leave for good reasons. In this case, the Employer noted the long disciplinary record of Grievant White. Moreover, the Employer asserts that it has exercised considerable restraint.

The Employer indicates that on two occasions, it offered EAP agreements to the grievant. Thus, this is not a situation where the Employer jumped at its decision to terminate an employee. Moreover, in this case, the Employer acted to remove the employee not on the fourth but on the fifth offense.

For all these reasons, the Employer asserts that there was just cause for the removal.

B. UNION

1. TESTIMONY AND EVIDENCE

Mr. Robert Blackwell testified he was an Account Clerk 2 in the Account Receivable section of Workers' Compensation and he knew Mrs. White. He went on to say he proposed the EAP and both sides agreed (See Joint Exhibit #3I). He said the parties agree to a 120 treatment instead of 90 and they agreed on a ten day suspension prior to the program. He said White complied with Joint Exhibit #3I.

Blackwell said he met with White and attended the meeting on 11/20/90 and he pointed out that Nancy Seman represented Management and the purpose was to agree that White had fulfilled the EAP contract. He said there was no discussion of further absences or discipline of White at that meeting.

Ms. Linda White, on direct, testified that she had been employed as a Statistician 1 for thirteen years. She said that on January 8, 1991, she had some problems and she wanted to see her attorney and needed time off. She said she had received a letter garnishing her wages on 1/7/91.

White said she asked Lucid for time off and he said No. She was asked on direct whether Lucid asked her to come in and she did not respond. White said it took her a while to get to work and she thought she could get personal time off. She went on to say that she did not expect to be fired on January 8, 1991.

On October 15, 1990, White said that her 70 year old mother had a heart attack and she could not get sick leave so she gave Management some documents. She said she tried to give a document identified as Union Exhibit #2 to Lucid and he refused it so she gave it to Blackwell.

White said she had time on the books in every area on January 8, 1991.

White said she was not behind on the weekly underwriting standards because those reports were on hold. She went on to say that the November office product could not be issued until she got paid from another employee.

White said that 11/20/90, she was told she had complied with the EAP agreement.

White said she was not told she would be disciplined if she did not come to work; rather, she said, she was just given a note saying she needed a doctor's report if she was out of work. She went on to say that she was never told that if she used time off, it would lead to discipline.

The Union cross examined Management witnesses. John Lucid, on cross, testified that he had denied leave to other employees besides Linda White.

On January 8, 1991, White asked for leave and Lucid said that he denied anything but sick leave. He went on to say he told her to come to work and she did show up at 10:00 a.m..

Lucid said that White was put on notice at the meeting on 11/20/90.

Lucid indicated White was not disciplined on April 9, 1990 because she had a good excuse. He went on to say that White was disciplined on 1/8/91 and it was progressive because she already had a ten day suspension for unexcused absences.

Lucid said that he granted properly requested sick leave. He said that on October 15, 1990, White's daughter called in and he said vacation was okay but sick leave was denied.

Lucid said that he recommended discipline for White on 1/8/91 and, in fact, he recommended termination because of her additional unexcused absence as she already had ten days off because she had in excess of 24 hours of unexcused absences. He noted she also had a five day suspension in 1989.

Ms. Nancy Seman, on cross, testified she sent out a notice of the meeting convened on 11/20/90 and she indicated that meeting was crucial and management wanted to put White on notice and bring her record up to date and they told White what would occur if she were off work again.

Seman said that White had complied with her EAP program.

Seman testified on cross that she along with the supervisor and the appointing authority made a decision to terminate White but she did not make the final decision.

2. ARGUMENT

The Union states that the evidence presented by the State is that White did not complete both of her EAP agreements. However, testimony came out, notes the Union, that she did complete her last EAP agreement.

Management, argues the Union, attempted to paint a picture indicating that White was not at work very often. However, the Management exhibits only show two other instances of unexcused absences; namely, on 4/9/90 and on 10/15/90. In short, the Union asserts that White's attendance had improved drastically over the last ten months of her employment. She only had two instances of unexcused absences.

On 1/8/91, the Union notes that White made a call requesting time off and it was denied and there was no reason for that denial, asserts the Union. Moreover, White came to work that day and the Employer's decision to terminate was inappropriate because Lucid had testified that there was a very liberal policy on granting personal leave to employees. White believed her request would be granted as it had been in the past.

The Union states that Management has the burden of proof and that discipline shall be commensurate with the infraction and White's "crime" on 1/8/91 was not cause for termination.

For all these reasons, White should be returned to her position as Statistician 1 and receive back pay.

V. DISCUSSION AND AWARD

The issue is whether the Grievant's discipline was for just cause? Was White's termination on 2/21/91 based on her continuing absentee record; that is, failing to come to work on a regular basis or was

Management's decision to terminate White unfair because White had completed her most recent EAP agreement and in fact was at work on a fairly regular basis?

Both John Lucid and Nancy Seman testified regarding White's absence and disciplinary record and White herself acknowledged her past discipline. White was verbally reprimanded on 8/5/86 and received a written reprimand on 10/30/86 as a result of unexcused absences. White was given a one (1) day suspension for violating work rule #13 (which deals with unexcused absences) and on 6/15/88 she received a three (3) day suspension for unexcused absences, again a violation of work rule #13. White, then, received a five (5) day suspension on 2/2/89 for neglect of duty, failure to follow written policies of management, unexcused absences, and falsification of an official document. A fourth instance occurred and on 3/16/90, Management's proposed termination of White was converted to a ten day suspension pending successful completion by White of the Employee Assistance Program.

White complied with the agreement that she complete 120 days in the Employee Assistance Program (see Employer Exhibit #3L) and the disciplinary hearing in connection with the fourth offense was re-convened on November 20, 1990. That meeting signified that the Employer's proposal to terminate White in March 1990 which had been placed in "abeyance" was removed completely. In effect, by successfully completing the 120 days of the EAP, White earned a second chance.

The Union argument suggests more meaning should be given to White's completion of the EAP and that more of the slate be erased. But there is no testimony or evidence to support the idea that termination would not be appropriate disciplinary action if, in fact, White continued to have excessive absenteeism and unexcused absences.

Apparently, White had a misconception that after the November 10, 1990 meeting, things were "back to normal" in that she could use "all the time on the books" with impunity and she would be granted requests for time off and only needed a doctor's slip for sick leave. On 1/8/91, she called to request time off which would have been the third time off work during the payroll period and Lucid denied the request. Thus, White had a second chance, but there was no improvement in her attendance, use of time off, or being absent without approval.

The Employer's decision to discharge White because of her failure to come to work on a regular basis (see Joint Exhibit #3H-#3Q) is not unreasonable, arbitrary or capricious. White, on cross examination, said she was aware of being told by management that continued absences would mean termination. The Union's claim that completing the EAP program somehow insulated White from future termination is not persuasive and its view that White came to work on a fairly regular basis is not supported by the testimony and evidence.

Thus, the grievance is denied.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
September 12, 1991